KARPAL SINGH

v.

ATTORNEY-GENERAL, MALAYSIA

HIGH COURT MALAYA, ALOR SETAR
MUSTAPHA HUSSAIN J
[ORIGINATING SUMMONS NO. 421 OF 1984]
23 DECEMBER 1985

CRIMINAL LAW AND PROCEDURE: *Cautioned statement - Section 113(1)(a)(ii) of Criminal Procedure Code - Whether can be taken before arrest.*

CIVIL PROCEDURE: *Setting aside of originating summons by defendant - Reasonable cause of action - Frivolous and vexatious - Principles on setting-aside - Aid of Court - Clarification of law - Right of plaintiff.*

The plaintiff is a famous lawyer and a leader of the DAP, an opposition political party. At the material time, there was a hot political issue concerning Bukit China in Malacca. In exercise of their democratic right to dissent, members of the DAP organized a walkathon which was to start from Alor Setar on 20 October 1984. The police permit was not given but the walkathon took place. When the walkathon had just started from Alor Setar town, 18 persons were arrested by the police and charged, the plaintiff not being one of those arrested.

On the 1 December 1984, an Inspector from Alor Setar police requested the plaintiff to give a cautioned statement under s. 113(1)(a)(ii) of the Criminal Procedure Code (hereinafter referred to as "the Code"). The plaintiff refused on the grounds that since he was never arrested, he need not give a cautioned statement.

The plaintiff then wrote to the defendant for clarification on 3 December 1984. The defendant replied that the plaintiff for his own interest should comply with the police request. The plaintiff therefore filed this originating summons to clarify the position and the law and the plaintiff sought a declaration of the Court that the police can only record a cautioned statement from him under s. 113(1)(a)(ii) of the Code after his arrest and not before arrest.

The defendant then applied by summons-in-chambers to set aside the originating summons on the grounds that the plaintiff's action disclosed no reasonable cause of action, the relief sought is purely academic and/or premature, the institution by way of originating summons is misconceived, frivolous, vexatious and an abuse of the process of the Court.

Held:

[1] The power to set aside any pleading is a drastic act. It deprives a litigant and those coming to Court from seeking justice. It can only be exercised in very rare cases where it is very obvious that there is no cause of action at all eg. where if the claim is clearly statute-barred.

[2] It is a right of the plaintiff to seek the aid of the Court to clarify the position of the law and it is also the right of the plaintiff not to do something which he is not obliged by law to do. Anyone can come to Court to seek relief and among other things, a declaration to his right or obligation. Therefore, on the facts here, the plaintiff does have valid right to come to Court and the defendant's application was therefore dismissed.

[3] It is clear that s. 113 concerns the admissibility of statements and its usage in a trial of the person who made the statements.

[4] Taking into account s. 112(v) of the Code, it is clear that the legislature had intended that the caution had to be administered under s. 113(1) therefore making s. 113 concern itself with questions of admissibility and administering of cautions.

[5] Reading s. 113(1)(a)(ii) in the context of s. 112(v), it is very plain and obvious that a cautioned statement can only be taken after the person has been arrested.

[Plaintiff's declaration allowed. Costs to the plaintiff.]

Legislation referred to:
Criminal Procedure Code, ss. 112, 112(v), 113, (1)(a)(ii)

For the Karpal Singh - in person
For the defendant - Lim Beng Choon

JUDGMENT

Mustapha Hussain J:

The plaintiff, Mr. Karpal Singh, filed this originating summons, seeking the declaration of the Court that the police can only record a cautioned statement from him under the provision of s. 113(1)(a)(ii) of the Criminal Procedure Code. **After** his arrest and **Not Before Arrest.**

The plaintiff filed this originating summons encl. (2) on the 26 December 1984.

The events that give rise to this application are, from the affidavits filed, as follows:

The plaintiff, Mr. Karpal Singh who is a famous lawyer is also a leader of the DAP, an opposition political party.

There was at the material time, a very hot political issue concerning Bukit China in Malacca where the DAP had taken issue with the authorities and as part of that campaign, probably in exercising the right to dissent (which is fundamental in a democracy), a walkathon was organised to start from Alor Setar on 20 October 1984. Apparently the police permit was not given but the walkathon took place. The police broke up the walkathon while still in its infancy in Alor Setar town and some 18 persons were arrested by the police.

The plaintiff was not arrested. The 18 people who took part in the abortive walkathon were brought to the police station and were charged. That all happened on 20 October 1984. On 1 December 1984 some 40 days or so later, an Inspector Sudha of the Alor Setar police went to see the plaintiff in his Penang office and requested the plaintiff to give a cautioned statement as directed by his superior under s. 113(1)(a)(ii) of the Criminal Procedure Code. The plaintiff refused on the grounds that since he was never arrested, he need not give a cautioned statement, as the provision of s. 113(1)(a)(ii) has not arisen. He telephoned the Kedah State Legal Adviser who was of the view that he has to.

On 3 December 1984, the plaintiff wrote to the defendant, the Attorney General who replied saying that the plaintiff for his own interest should comply with the police request i.e. to give the statement under s. 113 Criminal Procedure Code as required by the police.

As there was no one else to whom the plaintiff could turn to clarify the position, the plaintiff seeks redress in the High Court, the only avenue open to him. Hence, this originating summons being filed on 26 December 1984.

Then, the defendant applied by a summons-in-chambers (encl. (8)) to set aside the originating summons on the grounds that the plaintiff's action disclosed no reasonable cause of action, the relief sought is purely academic and/or premature, the institution by way of originating summons is misconceived, frivolous, vexatious and an abuse of the process of the Court, the usual standard formula used to set aside any pleading.

It is therefore necessary for the Court in order to determine the defendant's application to set aside the plaintiff's originating summons (encl. (8)), to also consider the substantive application in order to find out whether the application is misconceived, without cause of action, vexatious or abusive of the process of the Court.

On encl. (8) - Defendant's Application to Set Aside the Plaintiff's Originating Summons.
The power to set aside any pleading is a drastic act. It deprives a litigant and those coming to Court to seek justice, a full hearing of his case. It can only be exercised in very rare cases where it is very very obvious that there is no cause of action at all e.g. the claim is clearly statute-barred.

In our case here, the plaintiff is seeking a declaration from the Court and it is contended he can only do so if his right is violated or will be violated. What is this right? He had been asked by the police to give a cautioned statement which he strongly believed he should not do so as he was never arrested, i.e. the cautioned statement can only be taken from him only after he has been arrested. The State Legal Adviser also said he must. The defendant, the highest Legal Officer in the country, said he should do so.

The plaintiff was in a dilemma. He has the police breathing down his neck. He firmly and strongly believed he was under no obligation to do so. The only avenue left to him is the High Court. Surely this is a right of the plaintiff to seek the aid of the Court to clarify the position of the law to resolve this dilemma. Surely also, it is a right of the plaintiff not to do something which he is not obliged by law to do. Anyone can come to Court to seek relief and among other things, a declaration to his right or obligation. He must be given the full opportunity of being heard so that justice is not only done but be seen to be done. And if after hearing, the Court finds that the claim or relief sought is without cause of action, frivolous, vexatious and an abuse of the process of the Court, then the Court will punish him with costs.

Any attempt to narrow down the meaning of 'right' or what is tantamount to his right being violated to enable him to come to the Court, any attempt to block the only avenue open to those who seek justice will be looked with askance, by the Court.

The Court therefore dismiss the defendant's application to set aside the originating summons.

On encl. (2)- The Application for Declaration by the Plaintiff.
We have to look into and consider what s. 113 Criminal Procedure Code is all about.

> 113.(1) Where any person is charged with any offence **any statement,** whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person **shall be admissible in evidence** at his trial and, if the person charged tenders himself as witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that-

(a) no such statement shall be admissible or used as aforesaid-

(i) if the making of the statement appears to the Court to have been caused by an inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the Court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(ii) in the case of a statement made by the person after his arrest, unless the Court is satisfied that a caution was administered to him in the following words or words to the like effect:

It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence,

and

(b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which sub-section (1) applies shall not be bound to answer any questions relating to the case after any such caution as aforesaid has been administered to him.

The sub-section (1) itself speaks of **'any statement' ... "shall be admissible in evidence at his trial"** ... with the provisos that followed the sub-section (1). It is clear that s. 113 concerns the admissibility of statements and its usage in a trial of the person who made the statement; or so it would seem. (The material portion are underlined in red). The marginal notes say **"Admission of Statement in Evidence"**).

The provision of when and how to take the statement, whether oral, written, with or without caution are to be found in the preceding s. 112 Criminal Procedure Code.

112. (i) Any police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.

(ii) Such person shall be bound to answer all questions relating to such case put to him by such officer:

Provided that such person may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(iii) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(iv) A police officer examining a person under sub-section (i) shall first inform that person of the provisions of sub-section (ii) and (iii).

(v) A statement made by any person under this section whether or not a **caution has been administered to him under s. 113(1)** shall whenever possible, be taken down in writing and signed by the person making it or affixed with his thumb print as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish..

The marginal notes to s. 112 say **"Examination of Witness by Police"**. Section 112 sets out the whole rigmarole of the mode of taking down statements of witnesses in the course of a police investigation.

However, looking carefully at amended sub-section (v) of s. 112 where it states ... "A Statement made by any person under this section **whether or not a caution has been administered to him under s. 113(1) shall,** whenever possible, be taken down in writing...". The material words here are **"caution administered to him UNDER s. 113(1).".** The words are simple and clear (and underlined in red).

The legislature therefore had intended that the caution had to be administered under s. 113(1), making s. 113 not only concerning itself on the question of admissibility but also concerning the administering of cautions.

Coming back to s. 113(1) and reading (a)(ii) in the context of s. 112(v) which reads "in the case of a statement made by a person AFTER his arrest, unless the Court is satisfied that a **caution was administered** to him...", in the context of s. 112 (v), it is very plain and obvious, a cautioned statement can only be taken after the person had been arrested. Strangely enough, there are no legal provisions to enforce a person to give a statement to the police; there is no punitive clause, to those who refuse. The plaintiff, Mr. Karpal Singh could, if he wanted to, refuse to give the statements whether cautioned or not. As the learned Senior Federal Counsel, succinctly and correctly said in open Court during the submissions, Mr. Karpal Singh can tell the Attorney General to go and fly kites, and the Attorney General could not do nothing about it. Presumably Mr. Karpal Singh, the plaintiff who is a famous lawyer and law abiding, had wanted to co-operate with the police and give a statement but not a cautioned statement. He had come to the Court to seek a clarification and for the reasons stated above, he is correct in his belief and therefore Court allows the declaration sought by him i.e. the police can only take a cautioned statement from him only after he has been arrested.

Costs to the plaintiff.

Also found at [1986] 1 CLJ 332